No. 11,151

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE LOGIN CORPORATION (a corporation),
Appellant,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,
Appellee.

BRIEF FOR APPELLANT.

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STATEMENT OF JURISDICTION.

This is an action for alleged violation of the Emergency Price Control Act of 1942. (Pub. Law 421, 77th Congress, 2d Sess., c. 26, 50 U.S.C.A. App. 901 et seq.)

(Plaintiff's complaint, par. 1 of Count One. Tr. p. 22.)

Jurisdiction was conferred on the District Court by Section 205(c) of that Act.

Jurisdiction of this appeal from the judgment of said Court is conferred on this Court by Section 128 (a) of the Judicial Code. (43 Stat. L. 936, 28 U.S.C.A. paragraph 225.)

The notice of appeal from the judgment of the District Court appears at page 26 of the transcript.

The judgment appears at page 19 of the transcript.

STATEMENT OF THE CASE.

The plaintiff, Administrator, Office of Price Administration, hereinafter called the plaintiff, filed a complaint charging that the defendants made sales of Cuban lobster at prices in excess of the maximum prices permitted by the General Maximum Price Regulation. The defendants' answer denied the charges and a jury trial was demanded by them.

During pretrial conferences a stipulation of facts was entered into. (Tr. pp. 3 to 13.) It shows that the defendant, The Login Corporation, a California corporation, hereinafter referred to as "Login", was engaged in selling Cuban lobster as sales agent for Cia. Comercial Gainsborough, a corporation of Havana, Cuba, for export to Hawaii. (Tr. p. 5.) No violation is charged as to the sales made for export to Hawaii, but, in the course thereof certain sales were made to purchasers in the San Francisco area, in the manner set forth in the stipulation. It is these sales which are claimed to have been made in violation of the price regulation.

If these sales were made by Login as selling agent for the Cuban corporation, as they appeared on their face to have been, they were not subject to the General Maximum Price Regulation, and there was no viola-

tion. This—for the reason that if Login was the selling agent of a foreign seller the sales were expressly exempted from price control by the Maximum Import Price Regulation. (Tr. pp. 14 and 15.)

At a pretrial conference the trial Court ruled, contrary to the argument of Login, that on the stipulation of facts entered into, Login, as a matter of law, was not the "selling agent" of a foreign seller, within the meaning of the Maximum Import Price Regulation, with reference to the lobster sold in the San Francisco market, and ordered this issue removed from those to be tried by the jury at the time of trial. It ruled that the sales in question were subject to price control. (Tr. p. 16.)

This was the point at issue in the case. The parties later stipulated to the only other facts remaining undetermined, namely, the amount of lobster sold in the Bay Area, and that, if any violation occurred, it was not willful. (Tr. p. 17.)

Thereupon the trial Court ruled that as a result of its pretrial order above mentioned and of the just mentioned stipulation no question remained to be determined by the jury except the compilation of damages and therefore entered judgment against the defendant Login for the amount of the alleged overcharge, although denying the plaintiffs' application for an injunction. (The action was dismissed as to the defendant Gainsborough.) (Tr. p. 19.)

This appeal was taken by Login. The record is presented by an agreed statement of the case (beginning on page 2 of the transcript) under Rule 76.

The question involved on the appeal is whether the trial Court erred in ruling that Login as a matter of law was not a selling agent.

SPECIFICATION OF ERRORS.

The Court erred in ruling at the pretrial conference that Login, as a matter of law, was not the selling agent of a foreign seller within the meaning of the Maximum Import Price Regulation, paragraph 2 of Article I, which at the time in question provided:

> "Purchases from foreign sellers excepted from this and other price regulations. Neither this regulation nor any other price regulation (unless it contains express provision governing such purchases) shall apply to the purchases of any commodity to be imported into the continental United States by any person who deals directly with a foreign seller whose place of business is located outside the continental United States, or with his selling agent wherever located." (Max. Imp. Price Reg. issued Aug. 20, 1943, 8 Fed. Reg. 11681, Pike & Fisher, O.P.A. Service, paragraph 21, p. 141.)

SUMMARY OF ARGUMENT.

I.

History of use of term "selling agent" in the Maximum Import Price Regulation.

II.

The facts show affirmatively not only that Login was the selling agent of a foreign seller but that it was such as a matter of law. At the time of the trial, had one been held, the Court would have been obliged to direct judgment for the defendant. The Court therefore erred in ruling as a matter of law that Login was not a selling agent.

III.

The facts are not sufficient to support a finding that in the sales in question Login did not act as it purported to, namely, as selling agent. The burden of proof imposed upon the plaintiff, therefore, was not sustained. At the time of the trial the Court would have been obliged to direct judgment for the defendant. It therefore erred in ruling that Login as a matter of law was not a selling agent.

IV.

Even though it be held that the evidence does not, as a matter of law, show Login to be a selling agent, it at least presents a question of fact as to whether Login was a selling agent or was acting in its own behalf. The question, therefore, was one of fact for the jury under proper instructions

AS TO THE MEANING OF THE TERM "SELLING AGENT" OF A FOREIGN SELLER, AND THE COURT ERRED IN RULING, AS A MATTER OF LAW, THAT LOGIN WAS NOT A SELLING AGENT.

ARGUMENT.

I.

HISTORY OF USE OF TERM "SELLING AGENT" IN MAXIMUM IMPORT PRICE REGULATION.

The term "selling agent" of a foreign seller was not defined in the Maximum Import Price Regulation at the time of the sales here in question, nor had it been defined in any of the preceding regulations of the Office of Price Administration on the subject.

The term was first used in this connection by the O.P.A. in Revised Supplementary Regulation No. 12 (7 Fed. Reg. 10532) issued December, 1942, which, at the time governed sales of imported goods. It provided, in Section 1499.1404:

> "This regulation shall not apply to:
>
> (a) purchases of commodities to be imported by a person who deals directly with the seller or his selling agent wherever located."

Amendment No. 1, issued January 1, 1943, 8 Fed. Reg. 611, amended the section to read as follows:

> "1499.1404 Exceptions:
>
> (a) This regulation and the General Maximum Price Regulation shall not apply to:
>
> 1. Purchases of commodities to be imported by a person who deals directly with a foreign seller

outside the continent of the United States, or his selling agent wherever located."

Revised Supplementary Regulation No. 12 was reissued as the Maximum Import Price Regulation on August 20, 1943. It reenacted substantially the same provision in paragraph 2 of Article I:

"Purchases from foreign sellers excepted from this and other price regulations. Neither this regulation nor any other price regulation (unless it contains express provision governing such purchases) shall apply to the purchases of any commodity to be imported into the continental United States by any person who deals directly with a foreign seller whose place of business is located outside the continental United States or with his selling agent wherever located." (Max. Imp. Price Reg. Issued August 20, 1943, 8 Fed. Reg. 11681, Pike & Fisher, O.P.A. Service, paragraph 21, p. 141.)

The only official explanatory matter issued by the O.P.A. with these regulations regarding the term "selling agent" was that contained in the Statement of Considerations issued on December 14, 1942 in connection with Revised Supplementary Regulation No. 12, as required by law. It stated in part as follows:

"The changes in this revision may be summarized as follows:

1. * * *

2. *Purchases of commodities from abroad from an agent of a foreign seller in this country are treated as direct purchases from a foreign seller*

and are exempt from the General Maximum Price Regulation * * *.

On May 21, 1942, shortly after the G.M.P.R. became effective, the O.P.A. announced that the price at which goods might be purchased from a foreign seller was not subject to the provisions of that regulation if the domestic importer dealt directly with the seller in a foreign country, although the importer's resale in the United States was under the G.M.P.R. That interpretation is now embodied in this revision. However, *the exemption embodied in this revision includes the purchases made through the selling agent of a foreign seller contrary to the prior interpretation publicly issued.* The reason for this change is that it has been established that agents of foreign sellers ordinarily serve only the functions of bringing together the buyer in this country and the seller abroad, and did not have authority to set the price or terms of sale." (Pike and Fisher, O.P.A. Service, paragraph 21, pp. 521, 522.) (Italics are appellant's.)

This was the state of the regulations of the Office of Price Administration at the time of the sales under attack in regard to the term in question. They did not otherwise define the term.

II.

THE FACTS SHOW AFFIRMATIVELY NOT ONLY THAT LOGIN WAS A SELLING AGENT BUT THAT IT WAS SUCH AS A MATTER OF LAW.

An analysis of the facts stipulated to demonstrates beyond question that Login acted as selling agent for the Cuban corporation:

1. Nearly eighteen months before the transactions in question, Login had ceased importing lobster in its own behalf:

> "At this time Login discontinued handling lobster * * *" (Tr. p. 4.)

2. Login primarily is a sales agent; it negotiates sales for others. (Tr. p. 3.)

3. It was the selling agent for the Cuban corporation in making the sales for export to Hawaii in the course of which the sales in question occurred:

> "In October of 1943 Login as sales agent started selling Cuban lobster for the Cuban corporation for export to Hawaii." (Tr. p. 5.)

4. The purchasers' only contact with Login and Login's only contact with them was as sales agent. Login notified the brokers through whom they ordered the lobster that it, Login, could not import and sell lobster, but that it could, as agent, arrange for the purchase of lobster from its principal in Cuba by buyers whose ceiling permitted them to import and sell. (Tr. p. 5.) *The purchasers bought on this basis:*

> "On this basis orders were taken * * * through the local broker." (Tr. p. 5.)

5. The documents of the sales prove that Login acted as agent:

The sales memorandum given the purchasers by the broker through whom they ordered stated that: The sales were "for the account of" Roberts as "agents for Cia. Comercial Gainsborough". (Tr. p. 5.)

The confirmation of sale issued by Login to the purchasers, confirming and containing all of the terms of the sales contract, stated that Login acted "as agent for Cia. Comercial Gainsborough". (Tr. p. 8.) The invoices were sent to the purchasers by Login "as agent for Cia. Comercial Gainsborough". (Tr. p. 8.)

6. Login accounted to the Cuban corporation as agent for all the proceeds of the sales received by it, remitting to it everything except the charges incurred and its commission. (Tr. p. 9.)

7. Login was compensated as an agent at a five per cent sales commission. (Tr. p. 9.)

From these facts it is submitted but one conclusion can reasonably be drawn, namely, that Login acted in this transaction as selling agent.

The plaintiff himself admits by the stipulation that Login at the outset of the sales transaction involving the carload of lobster was the selling agent for the Cuban corporation:

> "In October of 1943 Login *as sales agent* started selling Cuban lobster * * *." (Tr. p. 5.)

There is no evidence in the record that it ever ceased to act as agent. There is no evidence in the facts stipu-

lated to that it ever commenced to operate in its own behalf, or that any part of the carload was sold in any different manner from any other, or that it ever sold in its own behalf in the sales in question. So far as the record shows the sales in the San Francisco area were part and parcel of the sale of the entire carload, as to the balance of which, other than the San Francisco area sales, Login was admittedly a sales agent.

Documentary evidence of the sales made at the time thereof is incontrovertible evidence that Login had continued to act as sales agent. The orders were taken from the purchasers by Roberts on the basis of the facts given it by Login, namely, that it could arrange for the purchases only as agent. The confirmation of sale by Login and its invoices are written evidence that it continued to act as agent.

Every action taken by it bespeaks the same character: It had long ceased to import in its own behalf; its statement to the broker that it could not import in its own behalf but could as agent; its accounting for the proceeds of sale; the mode in which it was compensated—all prove the relationship of agent.

No different result can follow from an analysis of Login's legal position. Its relationship in law was that of agent, to the purchasers, and to its principal, the Cuban corporation:

Certainly the purchasers' only dealings with Login were as agent. They contracted with Login only in this capacity. They could sue it only as agent and they could impose upon it only an agent's responsibility.

Their sales contract was primarily with the Cuban corporation. Login never acted in any other capacity than agent in its relationship with the purchasers.

The same is true as to its relationship with its principal the Cuban corporation. As to it Login was admittedly its selling agent. It accounted to it as such and its compensation from it was as such. No possible reason for holding it to have any other relationship to the Cuban corporation can be found in the record.

It is submitted that all of the evidence in this record leads to but one conclusion and that is that Login acted as selling agent in the transaction in question. Appellant submits that no reasonable man could conclude otherwise from the evidence and that there is no legal relationship arising from the facts which would require any Court to rule otherwise. Login, in this situation, we submit, was the selling agent of the Cuban corporation, *as a matter of law*. Being such, the sales were exempt from price control and there was no violation.

Under these circumstances had the case proceeded to trial the Court would have been obliged to direct a verdict in favor of Login. The trial Court's ruling therefore was not only flagrantly in error but is directly contrary to the only conclusion which can be drawn from the facts. The judgment should be reversed with directions to enter judgment for the appellant.

III.

THE FACTS ARE NOT SUFFICIENT TO SUPPORT A FINDING THAT IN THE SALES IN QUESTION LOGIN DID NOT ACT AS IT PURPORTED TO NAMELY AS SELLING AGENT. THE BURDEN OF PROOF IMPOSED UPON THE PLAINTIFF, THEREFORE, WAS NOT SUSTAINED. AT THE TIME OF THE TRIAL THE COURT WOULD HAVE BEEN OBLIGED TO DIRECT JUDGMENT FOR THE DEFENDANT.

As has been pointed out the sales relied upon by the plaintiff to show a violation of the regulation were those made to purchasers in the San Francisco Bay Area. To secure a judgment against the defendant the plaintiff of course has the burden of proving the making of the sales and of proving that they violated the regulation. The evidence upon which he must rely is that contained in the stipulation.

However, all of the evidence upon which the plaintiff must rely in order to prove the *making* of the sales shows only sales made by Login *as agent. All* the evidence concerning the making of those sales—that is all of the facts stipulated to regarding them—*shows that they were made by Login as sales agent.* The orders were taken from the purchasers on the basis that Login as sales agent would arrange the purchase from its principal. The sales memorandum shows the sales were made for the account of E. L. Roberts Co., "as agents for Cia. Comercial Gainsborough". The confirmation of the sale and the invoices likewise show that the sale was made on behalf of the Cuban corporation by Login as sales agent. *All* of the evidence regarding Login's relationship with the purchasers is evidence of agency on Login's part. Thus the evidence of the sales contracts themselves, and the evi-

dence of the making of them, is proof only of sales by a selling agent.

But the plaintiff was obliged to prove more than this. He was obliged to prove sales by Login acting in its own behalf. This required him to prove that the sales which he attacks were not what they appeared on their face to be, namely, sales by Login as agent for the Cuban corporation. Unless he did so no violation was shown since the sales he did prove were expressly exempted from the regulation as sales by a selling agent. The burden to prove a violation was on the plaintiff. He was therefore required to prove that the sales were in fact made by Login acting in its own behalf and not as agent.

The appellant submits there is no such evidence in the record. The stipulation contains all of the plaintiffs' proof. It contains no evidence that the sales were not made in good faith as they purported to be. It contains no evidence that they were made by Login acting in its own behalf.

Thus had a trial been had the trial Court, for this reason, if for no other, would have been obliged to direct a verdict in favor of the defendant Login. The action taken by the Court in pre-trial conference ruling Login as a matter of law not to be a selling agent was not only in error, but directly contrary to the ruling which it should have made at the time of trial.

Because the record contains all of the evidence, and because it does not contain proof of a violation it is submitted that the judgment should be reversed with directions to enter judgment for the appellant.

IV.

EVEN THOUGH IT BE HELD THAT THE EVIDENCE DOES NOT, AS A MATTER OF LAW, SHOW LOGIN TO BE A SELLING AGENT, IT AT LEAST PRESENTS A QUESTION OF FACT AS TO WHETHER LOGIN WAS A SELLING AGENT OR WAS ACTING IN ITS OWN BEHALF. THE QUESTION, THEREFORE, WAS ONE OF FACT FOR THE JURY UNDER PROPER INSTRUCTIONS AS TO THE MEANING OF THE TERM "SELLING AGENT" OF A FOREIGN SELLER, AND THE COURT ERRED IN RULING AS A MATTER OF LAW THAT LOGIN WAS NOT A SELLING AGENT.

Even though the Court should not hold that Login as a matter of law was a selling agent, nevertheless the facts were such that Login was at least entitled to have the jury determine this issue.

It is of course the rule that where the evidence is such that different inferences may be drawn from it the determination of the ultimate question of fact to be decided from the evidence is the province of the trier of fact.

The ultimate question of fact to be decided in this case was whether Login had acted as selling agent of the Cuban corporation or in its own behalf. This question necessarily is to be decided from all of the facts surrounding the transaction.

These evidentiary facts normally would have been presented by the plaintiff and defendant through oral testimony to the trier of fact—in this case the jury. From the evidentiary facts so presented the jury would have determined the ultimate question of fact: Was Login acting as selling agent or in its own behalf? Its decision would have been final. Such determinations are the province of the jury under proper instructions.

In this case in lieu of the plaintiff and defendant establishing the evidentiary facts through witnesses, they stipulated to them in writing. They did not stipulate to the ultimate fact to be decided, i.e., whether Login acted as selling agent or in its own behalf. The determination of that fact was the province of the trier of fact.

If different inferences could be drawn from the facts stipulated to Login was entitled to have this question determined by the jury just as much as if the trial had proceeded without a stipulation. There can be no doubt of its right to a jury trial had the facts been presented by oral testimony to the jury. The rule is not different because the facts are uncontradicted and stipulated to.

Parties do not waive their right to a final determination of questions of fact by the trier of fact—be it Court or jury—because the evidence is without conflict or because they have stipulated to part of it, or all of it. These things in themselves are not determinative of the right.

Rather, the test of the right to determine the ultimate question of fact is whether different inferences can reasonably be drawn from the evidence. If they can the question is one for the trier of fact regardless of whether the evidence be uncontradicted, or stipulated to in writing. Such is well established law:

> "It (the court) may adopt the agreed statement (of facts) as its own findings of fact, or it may make findings therefrom to correspond with

the issues to be determined; and, as it is required to find only the ultimate facts in the case, it may find such ultimate facts from the probative facts set out in the agreed statement, as well as from evidence thereof. An agreed statement of facts is but a substitute for evidence of those facts * * *''

Towle v. Sweeney (1905), 2 Cal. App. 29, 31, 83 Pac. 74.

''The evidence in the instant case was without conflict, and the findings rest on inferences drawn from declarations of the board, together with circumstances judicially noticed; and though the facts would support inferences favorable to the appellant, those drawn by the court also find reasonable support therefrom. They fairly overcome the presumptions mentioned, and sustain the conclusion that no necessity or emergency within the meaning of the charter was shown. Where fair and impartial minds may draw different conclusions from the evidence though there be no conflict therein, the conclusions drawn by the trial court must be sustained on appeal'', citing cases.

Spreckels v. San Francisco, 76 Cal. App. 267, 275, 244 Pac. 919. (Hearing denied.)

''There was considerable testimony by both of the plaintiffs and minute cross-examination of them on that subject. The employees of defendant were also closely examined touching the same matter. (2) While no particularly glaring conflicts are present, different conclusions as to the knowledge and conduct of the plaintiffs may be reasonably drawn by different minds from the

same evidence, thus presenting a case peculiarly within the province of the jury to determine."

Meindersee v. Meyers, 188 Cal. 498, 502, 205 Pac. 1078.

"There is but little, if any, conflict in the evidence. *What inferences should the court have drawn from the substantially uncontradicted evidence is really the question presented by the record.* We have examined the evidence with care, and are free to say that if the court had found that the offer of Hatcher was not made and accepted in good faith, but for the purpose of defrauding defendant we would have sustained such finding.

"But from this it does not follow that we are not obliged to sustain the finding made. *Where fair and impartial minds may draw different conclusions from the evidence, though there be no conflict in the testimony, it is a case for the jury or trial court to decide."* (Italics ours.)

Bettens v. Hoover, 12 Cal. App. 313, 318, 107 Pac. 329.

On this point, the issue on appeal is not whether there is support in the record for a trial Court's ruling that Login was not an agent. Even though this were true the trial Court's ruling in this case is error, nevertheless, if there are any other facts in the record which would support a contrary finding.

Rather, the issue before the Court on this point is whether there are *any* facts in the evidence stipulated to from which a jury could conclude that Login had

acted as selling agent. If there were then a question of fact was presented by the evidence which should have been submitted for decision to the jury.

Appellant submits it is too obvious for argument that from the facts stipulated to any jury could reasonably have found that Login had acted as selling agent for the Cuban corporation. The evidence therefore presented a question of fact—whether Login was acting as selling agent, or in its own behalf—which should have been submitted for determination to the jury under proper instructions. The trial Court therefore erred in ruling as a matter of law that Login was not a selling agent, thus denying appellant a determination of this question by the jury it had demanded.

CONCLUSION.

It is respectfully submitted that the judgment should be reversed with directions to enter judgment for the appellant.

Dated, San Francisco,
January 2, 1946.

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Attorneys for Appellant.